No. 75-1800

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY P. CALLAHAN, JR., AND NORBERT A. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 534 F. 2d 763. The opinion of the district court is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976. A petition for rehearing was denied on May 12, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the government possesses a statement of a prospective witness who is not a government agent, the government can be required, prior to trial,

to produce that part of the statement containing the prospective witness's recollection of oral statements made to him by the defendant.

STATUTORY PROVISION AND RULE INVOLVED

18 U.S.C. 3500(a) provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) *Disclosure of Evidence by the Government.*
>
> (1) *Information Subject to Disclosure.*
>
> (A) *Statement of Defendant.* Upon a request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent * * *.
>
> * * * * *

> (2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500.

STATEMENT

Petitioners were charged in a twelve-count indictment filed in the United States District Court for the Northern District of Illinois with various violations of 15 U.S.C. 645(a) and (b), and 18 U.S.C. 2(a), 2(b), 201(b)(2), 1001, and 1503[1] (R. 1).[2] Prior to trial petitioners filed a dis-

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[1]The indictment charged petitioner Callahan with aiding, abetting, and counselling the making of false Small Business Administration (S.B.A.) disaster loan applications (Counts One, Four, and Eight); making false entries in a S.B.A. damage verifier's report (Counts Two, Five, and Nine); and asking, soliciting, accepting and receiving bribes in return for allowing the fraudulent obtaining of S.B.A. disaster loans (Counts Three, Six, and Ten). Petitioner Young was charged with aiding, abetting and counselling the making of false S.B.A. disaster loan applications (Counts One and Four); aiding and abetting the receiving of bribes in return for allowing the fraudulent obtaining of S.B.A. disaster loans (Count Six); knowingly making and causing to be made a document containing false entries for submission to the S.B.A. in substantiation of a disaster loan application (Count Seven); making a false disaster loan application (Count Eight); giving, offering, and promising money to petitioner Callahan, a S.B.A. official, with the intent and for the purpose of obtaining a S.B.A. disaster loan (Count Eleven); and knowingly attempting to obstruct justice by influencing others to testify falsely before the grand jury (Count Twelve).

[2]"R." references are to the documents comprising the original record on appeal as designated by the clerk of the district court.

covery motion asking that the government be ordered to produce "a copy of statements or confessions of the defendant[s] in the possession of government agents or summaries of statements or confessions including: (a) reports or portions of reports which contain the summaries of statements or confessions allegedly made by the defendant[s] to witnesses or third parties whether they are law enforcement officials or not; [and] (b) portions of grand jury testimony which allegedly relate the statements or confessions of the defendant[s] as related to third persons" (R. 9).

The district court granted the motion insofar as it requested production, *inter alia,* of petitioners' statements in the nature of admissions, confessions or acknowledgments of guilt (see R. 30 at 2),[3] even those that were orally made to third-party, nongovernment agent prospective witnesses and first reduced to writing later as a part of the witnesses' statements reporting their recollections of what the petitioners had said. Pursuant to this discovery order, the government identified those prospective witnesses' "statements" which arguably contained such recollections (R. 50 at 8-9). These included certain grand jury transcripts of prospective witnesses' testimony and handwritten, non-verbatim memoranda of interviews of prosective government witnesses. The district court conducted an *in camera* inspection of these documents

[3]In its initial oral ruling on the discovery motion, the court had specified that the government disclose all portions of prospective government witnesses' statements in which were incorporated oral "inculpatory statements" of petitioners, whether made during the course of, or after, the commission of the offenses charged (R. 37, at 7, 8, 9, 12, 13, 17, 30). In response to the government's motion for clarification, the court stated that mere "inculpatory statements" need not be disclosed, but that all statements "in the nature of an admission or confession or acknowledgement of guilt" must be turned over to petitioners (R. 53 at 2, 3).

(R. 30 at 2; R. 53 at 18), and found nothing in the non-verbatim memoranda that required disclosure. But, as reported by the court of appeals (Pet. App. 10-11), "[t]he District Court delineated those portions of the transcribed oral [grand jury] testimony of two witnesses which it determined to contain inculpatory oral statements by the [petitioners] and heard by the witnesses, and ordered the Government to disclose those portions to [petitioners]."

The government complied with all aspects of the district court's discovery order except with regard to the grand jury testimony of two prospective government witnesses (see Pet. App. 1).[4] The government contended that the Jencks Act, 18 U.S.C. 3500, relieves it from the obligation of turning over statements of its prospective witnesses until the witness has testified on direct examination at trial. Petitioners moved to dismiss the indictment for failure to comply with the pretrial discovery order, and the district court granted the motion (Pet. App. A). The government appealed the district court's order pursuant to 18 U.S.C. 3731; the court of appeals vacated the order dismissing the indictment and remanded the case to the district court with instructions to withdraw the discovery order (Pet. App. B).

ARGUMENT

Petitioners contend that under Rule 16(a)(1)(A), Fed. R. Crim. P., the government can be required, prior to trial, to disclose oral statements in the nature of confessions made by petitioners to third persons who are not government agents but who are prospective government

[4]Copies of written or recorded statements made by petitioners were produced by the government, in accordance with Rule 16(a), Fed. R. Crim. P., as were reports of the circumstances surrounding relevant admissions made by petitioners to prospective government witnesses (R. 36, 40; R. 37 at 30).

witnesses, when those statements are reduced to writing only later as part of the witnesses' statements regarding their recollections of what petitioners had said. We note initially that there is no need for this Court to grant the petition for a writ of certiorari at this time. The petition challenges the court of appeals' reversal of the district court's pretrial dismissal of the indictment. That reversal puts petitioner in the same position as if the district court had ruled against him in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States,* 309 U.S. 323. Similarly, review now by this Court of the court of appeals' decision here would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed, they will then be able to present their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

In any event, the court of appeals correctly concluded (Pet. App. 13-14) "that the language of [the Jencks Act, 18 U.S.C. 3500] precludes [petitioners'] Rule 16 pretrial discovery and disclosure of the delineated portions of the transcribed Grand Jury testimony of the prospective witnesses under challenge by the Government." A similar view has been adopted by several other courts of appeals. *E.g., United States* v. *Walk,* 533 F. 2d 417 (C.A. 9); *United States* v. *Feinberg,* 502 F. 2d 1180 (C.A. 7), certiorari denied, 420 U.S. 926; *United States* v. *Wilkerson,* 456 F. 2d 57 (C.A. 6), certiorari denied, 408 U.S. 926; *United States* v. *Kenny,* 462 F. 2d 1205, 1212 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States,* 409 U.S. 914. See also *United States* v. *Dorfman,* 53 F.R.D. 477 (S.D. N.Y.), affirmed, 470 F. 2d 246 (C.A. 2).

The interplay between Rule 16's provision for disclosure of the defendant's own statements and the Jencks

Act's prohibition against compelling the prosecution to disclose the statements of its witnesses involves what is in most instances a relatively straightforward distinction between two different categories—a distinction that petitioners would virtually obliterate. A statement is discoverable under Rule 16 if it was written by the defendant himself (even though turned over to the government by a prospective witness) or if it was recorded contemporaneously with its utterance by the defendant. On the other hand, oral statements of the defendant are, by explicit provision of the rule, discoverable only if they had been made to a person known by the defendant, at the time the statement was uttered, to be a government agent. It plainly follows that statements that were neither written by the defendant nor recorded when spoken[5] and that were made to a person who was not (or was not known to the defendant to be) a government agent, are, when related to government investigators or to the grand jury by a third party, statements of that person (and not statements of the defendant) for purposes of Rule 16 and of the Jencks Act.

Consequently, as the Seventh Circuit concluded in *Feinberg, supra,* "where the statement is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded" (502 F. 2d at 1183). Since it is precisely that kind of statement that is at issue here, the

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[5]There is a potential gray area in the case of statements that were made by the defendant in contemplation that they would be reduced to writing essentially verbatim, but where the reduction to writing is somewhat delayed. *Feinberg, supra,* 502 F. 2d at 1183, suggests that such statements might be discoverable pursuant to Rule 16. But no statements of this kind are involved in the instant case.

court of appeals correctly determined that the government could not be compelled to produce it in advance of trial.

This interpretation of Rule 16 is fully consistent with the Jencks Act, the purpose and legislative history of which "compel[led]" this Court "to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." *Palermo* v. *United States,* 360 U.S. 343, 351. The statements at issue here are properly characterizable as statements of prospective government witnesses, and disclosure of them can be compelled only after the witnesses have testified on direct examination at trial.[6]

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[6]Contrary to petitioners' claim (Pet. 11), the decision of the court of appeals here does not conflict with decisions in the Second and the District of Columbia Circuits. In *United States* v. *Crisona,* 416 F. 2d 107 (C.A. 2), the court dealt not with the oral statement of a prospective witness recalling oral statements made to him by a defendant, as is the case here, but with a tape recording made of the defendant's conversation with a third party (*i.e.,* a "recorded statement" of the defendant explicitly made discoverable by Rule 16). See *United States* v. *Dorfman, supra,* in which the district court distinguished *Crisona* and held that a defendant could not inspect and copy oral statements made to a government witness and subsequently put into a written statement, and that such material was available to a defendant only after the witness had testified at trial. In the other Second Circuit case cited by petitioner, *United States* v. *Percevault,* 490 F. 2d 126, the court held that Rule 16 did *not* authorize the district court to compel pretrial disclosure, over government objection, of written or oral statements of co-conspirators whom the government intended to call as witnesses at trial, and that the Jencks Act prohibited such disclosure.

Similarly, the decision of the District of Columbia Circuit in *United States* v. *Bryant,* 439 F. 2d 642, on which petitioners rely, is inapposite. In *Bryant* the government claimed to have lost a tape recording of a conversation between defendant and an undercover agent made by government agents. The court of appeals

Finally, we note that this case is apparently the first to be decided by an appellate court under the most recent amendments to the Rules, which became effective in December 1975, and which would govern further proceedings in this case.[7] Even if there were some question about the soundness of the court's construction of the rule—which we submit there is not—it would appear premature for this Court to attempt to resolve the question now, rather than await further consideration of the issue by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
IVAN MICHAEL SCHAEFFER,
Attorneys.

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remanded the case solely for a determination of whether the government was either negligent or acting in bad faith and for a determination of the importance of the evidence lost. The court did not order disclosure of statements by prospective government witnesses. Moreover, this case, like *Crisona,* involved a tape-recorded statement of the defendant, as opposed to an oral statement, and it was only for this reason that Rule 16 was pertinent (see 439 F. 2d at 647). Furthermore, the statement was to a government agent, not a third-party, nongovernment agent witness.

[7]If anything, the amendments to Rule 16 weaken petitioners' position. In specifying that certain oral statements of the defendant could be ordered disclosed, the amended Rule limits disclosure to such statements when made "in response to interrogation by any person then known to the defendant to be a government agent."

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